

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ZHAOYIN WANG,
Plaintiff,

v.

BETA PHARMA, INC., DON ZHANG,
AND ZHEJIANG BETA PHARMA
CO., LTD.,
Defendants.

No. 3:14CV1790 (VLB)

APRIL 21, 2015

REPLY BRIEF IN SUPPORT OF
EMERGENCY MOTION TO QUASH SUBPOENA

Pursuant to Rule 7(d) of the Local Rules of this Court, defendants Beta Pharma, Inc. ("Beta Pharma") and Don Zhang ("Dr. Zhang") (collectively, "Defendants") hereby file this Reply Brief in support of their Emergency Motion to Quash Subpoena, filed on March 27, 2015 (the "Motion to Quash") [D.E. #56]. In the Motion to Quash, Defendants ask the Court to quash a subpoena (the "Subpoena") that Plaintiff served on Teplitzky & Company, P.C. ("Teplitzky"), an accounting firm that formerly provided services to Beta Pharma, pending a decision on Defendants' Motion to Disqualify Counsel (the "Motion to Disqualify"), filed on April 21, 2015 [D.E. #64].

If Teplitzky complies with the Subpoena before the Court rules on the Motion to Disqualify, Defendants' confidential and sensitive documents will be provided to a conflicted attorney. Brief in Support of Motion to Quash ("Supp. Br.") at 10-12. The Court can serve the interests of justice and preserve the integrity of this action by ensuring that Teplitzky's compliance occurs only after

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the conflict issue has been resolved. Plaintiff's three arguments in opposition to the Motion to Quash are unavailing. For these reasons, and for the reasons in Defendants' moving papers, this Court should grant the Motion to Quash.

I. Rule 45(d)(3)(A) Authorizes the Motion to Quash

Plaintiff first argues that the Motion to Quash does not assert any permissible reason for moving to quash a subpoena under Rule 45 of the Federal Rules of Civil Procedure. Plaintiff's Memorandum in Opposition to Defendants' Emergency Motion to Quash Subpoena ("Opp. Br.") [D.E. #61] at 3-4. This argument misses the mark. Under that Rule, "the court for the district where compliance is required must quash or modify a subpoena that: ... (iv) subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A). The undue burden on Defendants is the provision to a conflicted attorney of Defendants' confidential and sensitive materials, including their tax returns. Supp. Br. at 12.

Plaintiff argues that the "undue burden" provision does not apply because the undue burden will fall on Defendants rather than Teplitzky. Opp. Br. at 3. However, the Rule speaks of subjecting a person, rather than just a subpoenaed party, to undue burden. The Rule "refers to undue burden on 'a person' ... it is not limited to the person receiving the subpoena." Special Markets Ins. Consultants, Inc. v. Lynch, 2012 WL 1565348, at *1 (N.D. Ill. May 2, 2012) (quashing, on defendants' motion, subpoena to telephone company that sought defendants' electronic communications). A party may move to quash a subpoena based on undue burden to the moving party where the subpoena is highly intrusive into the moving party's financial affairs. Enviropak Corp. v. Zenfinity

Capital, LLC, 2014 WL 4715384, at *3 (E.D. Mo. Sept. 22, 2014) (quashing, on plaintiff's motion, subpoena to bank that sought plaintiff's financial information). Defendants are both "persons" under the Federal and Local Rules, who may move to quash the Subpoena on the grounds of burdensomeness. See, e.g., D. Conn. L. Rule 26(c)(6) (the term "person" for purposes of discovery requests includes "any business, legal or governmental entity or association").

Defendants have standing here because they have personal rights in the documents at issue. Indeed, they are Defendants' financial documents. It is well-established that a party has standing to move to quash a subpoena directed to a non-party when the moving party has a personal right with respect to the documents sought. Estate of Ungar v. Palestinian Auth., 332 Fed. Appx. 643, 645 (2d Cir. 2009) (quoting 9A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2459 (3d ed. 2008) for the principle that an objecting party has standing if it "claims some personal right or privilege with regard to the documents sought."). For example, a defendant had standing to challenge a subpoena to a non-party that sought the defendant's financial information because "[c]ompliance with the subpoena might infringe on certain privacy rights, in that [the plaintiff] would have easy access to [the defendant's] unrelated financial and business dealings in detail." Chem. Bank v. Dana, 149 F.R.D. 11, 13 (D. Conn. 1993). Many courts in this circuit have recognized that a party may move to quash a subpoena to another entity if the records sought concern the party's "personal financial affairs." Arias-Zeballos v. Tan, 2007 WL 210112, at *1 (S.D.N.Y. Jan. 25, 2007) (collecting cases).

Here, the Subpoena seeks documents regarding Defendants' personal financial affairs. Supp. Br. at 11. For example, the Subpoena seeks their tax returns, accountant work product related to their tax returns, and documents concerning audits of their tax returns. Courts have recognized that tax returns are private and confidential; accordingly, a "qualified privilege" applies to the disclosure of tax returns. Gattegno v. Pricewaterhousecoopers, LLP, 205 F.R.D. 70, 72 (D. Conn. 2001). There is also a fundamental right of privacy in financial information generally. Sec. Indus. & Fin. Markets Ass'n v. Garfield, 469 F.Supp.2d 25, 35 (D. Conn. 2007).

In this case, Defendants are seeking to quash the Subpoena (pending resolution of the Motion to Disqualify) because they face a quite real and important burden if Teplitzky provides the information sought while the Motion to Disqualify is pending—the production of their own sensitive documents, including their income tax returns, to a conflicted attorney. This represents at least as much of a burden as the concerns that courts have accepted as conferring standing on parties that challenged subpoenas to non-parties. See Special Markets Ins. Consultants, Inc., at *1-2 (the subpoenas at issue exposed the plaintiffs to the "annoyance and embarrassment" of having their personal communications disclosed); Enviropak Corp., at *5 (the subpoena was highly intrusive into the plaintiff's personal financial affairs).

Also, in addition to the Court's authority under Rule 45, the Court's authority to quash a subpoena that threatens the integrity of this proceeding is also supported by its general authority to control the discovery in a civil action

before it. Degen v. United States, 517 U.S. 820, 826 (1996) (“The District Court has its usual authority to manage discovery in a civil suit, including the power to enter protective orders limiting discovery as the interests of justice require.”).

Plaintiff’s remaining discussion under this heading concerns the relevance of the subpoenaed documents. Opp. Br. at 3-4. That argument is immaterial, because Defendants have not sought to quash the Subpoena on relevance grounds.

II. The Motion to Quash is Ripe for Decision

Plaintiff next argues that the Motion to Quash is unripe because it is based on a hypothetical set of events. Opp. Br. at 4-5. He rests this argument on the fact that, at the time that he filed the Opposition Brief, Defendants had not yet filed the Motion to Disqualify. However, Defendants have now filed the Motion to Disqualify, so at this point there is nothing “hypothetical” about that motion. Plaintiff’s assertion that if the Court denies the Motion for Protective Order, Defendants will not file the Motion to Disqualify (Opp. Br. at 5) is based on a mistaken interpretation of the Motion for Protective Order, and in any case has been rendered moot by the actual filing of the Motion to Disqualify. The issue of disqualification is not hypothetical, but is pending before the Court.

Plaintiff also asserts that the Motion to Quash assumes that Katz will be disqualified. Opp. Br. at 5. However, the language of the Motion to Quash establishes that it asks the Court to quash the Subpoena pending resolution of the Motion to Disqualify. Motion to Quash at 1. Defendants have not asked that Plaintiff be permanently barred from obtaining the requested deposition or

documents from Teplitzky, but only that such compliance be barred until the Court rules on the Motion to Disqualify. In addition, many courts have stayed proceedings pending resolution of disqualification motions. See, e.g., Penn Mut. Life Ins. Co. v. Berck, No. DKC-09-0578, 2010 WL 3294309, at *3 (D. Md. Aug. 20, 2010) (granting motion to stay proceedings pending disposition of defendant's motion to disqualify opposing counsel); Helmer v. Goodyear Tire & Rubber Co., No. 12-CV-00685-RBJ, 2013 WL 328951, at *2 (D. Colo. Jan. 29, 2013) (court granted motion to stay all other proceedings pending resolution of motion to disqualify counsel); IPVX Patent Holdings, Inc. v. 8X8, Inc., No. C-13-017070-SBA, 2013 WL 6000590, at *2 (N.D. Cal. Nov. 12, 2013) (granting motion to stay discovery pending resolution of defendant's motion to disqualify plaintiff's counsel).

III. Plaintiff's Argument About Defendants' Motion for Protective Order is Irrelevant to the Present Motion

Plaintiff also raises an entirely irrelevant issue: his opposition to Defendants' motion for a protective order that would permit them to submit certain documents in support of the Motion to Disqualify without waiving privilege as to those documents. Opp. Br. at 6-8; see Emergency Motion for Entry of Protective Order for Motion to Disqualify Counsel, filed on March 20, 2015 (the "Motion for Protective Order") [D.E. #49]. The issues raised by the Motion for Protective Order are important ones, but they are not relevant to the Court's decision on the Motion to Quash. The Motion for Protective Order concerns an entirely different set of documents, including information protected by the attorney client privilege and the work product doctrine; it has nothing to do with

any of the documents sought in the Subpoena, which are tax and accounting records.¹

According to Plaintiff, "Defendants assert that the subpoena should be quashed because they have moved for the entry of [the proposed] protective order." Opp. Br. at 6. But that misconstrues Defendants' position. The basis for quashing the Subpoena is the Motion to Disqualify, not the Motion for Protective Order. Defendants discussed the Motion for Protective Order in the Support Brief merely to explain the procedural posture of the action as it existed at that time. The necessity for quashing the Subpoena is independent of the Motion for Protective Order.

IV. Conclusion

For all the foregoing reasons, and the reasons presented in the Support Brief, Defendants respectfully request that the Court grant the Motion to Quash.

**DEFENDANTS BETA PHARMA, INC. AND
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By: /s/

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¹ Also, Defendants have explained in their Reply Brief in support of the Motion for Protective Order, filed on this same date [D.E. #65], that the protective order they seek is justified and consistent with the law governing the assertion and waiver of the attorney-client privilege.

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2015 a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/

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